A

CHEAH YOON LIM

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: J-05-54-2001]

C

7 JULY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drug - Appeal against conviction and sentence to death - Whether unusually high burden placed on accused - Presumptions*

D

- Whether facts insufficient to support case for trafficking - Substitution of lesser charge - Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A

This was an appeal by the accused/appellant who was convicted and sentenced to death by the High Court for an offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). The appellant raised two main points of appeal: (i) the trial judge failed to appreciate the defence case thereby imposing an unusually high burden on the appellant to raise a reasonable doubt; and (ii) the conflicting versions between the prosecution and the defence case *ie*, the prosecution said the appellant was carrying the bag containing the drug whilst the appellant said the bag was not with him but was already in the back seat of his car and that it belonged to one Ah Koon.

E

F

Held (allowing the appeal)

G

Per Hashim Yusoff JCA delivering the judgment of the court:

(1) The trial judge, in finding that the appellant had failed to lead evidence to prove the existence of Ah Koon, had placed an extra burden on the defence. This amounted to a serious misdirection on her part. Even the Deputy Public Prosecutor conceded that the appellant need not call evidence to corroborate his story. However, there was an admission of possession of the bag by the appellant, which was consistent with the facts and which his counsel also conceded. In view of the activation of the presumption of knowledge under

H

I

s. 37(d) of the Act, the presumption of trafficking under s. 37(da) of the Act could not be invoked. Without the aid of the presumption, the facts were insufficient to support a case for trafficking. Therefore, the conviction under s. 39B(1)(a) of the Act was substituted with one under s. 6 to be read together with s. 39A of the Act, in view of the amount of drugs (70.2 grams of monoacetylmorphine) involved. (paras 11, 12 & 13)

[Sentence of 15 years imprisonment to commence from date of arrest and mandatory ten strokes of rattan.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan orang kena tuduh/perayu yang disabit dan dihukum mati oleh Mahkamah Tinggi di atas kesalahan mengedar dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Perayu mengemukakan dua hujahan utama rayuan: (i) hakim perbicaraan gagal memahami kes pembelaan dan dengan itu mengenakan beban yang terlalu tinggi ke atas perayu untuk menimbulkan keraguan munasabah; dan (ii) versi bercanggah di antara pendakwa dan kes pembelaan iaitu, pendakwa mengatakan perayu membawa beg yang mengandungi dadah tersebut sementara perayu mengatakan beg tersebut tidak terdapat padanya tetapi telah terletak di tempat duduk belakang keretanya dan bahawa ia kepunyaan satu Ah Koon.

Diputuskan (membenarkan rayuan)
Oleh Hashim Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan, yang memutuskan perayu gagal mengemukakan keterangan untuk membuktikan kewujudan Ah Koon, telah mengenakan beban tambahan ke atas pembelaan. Ini bermaksud satu salah arah serius telah dibuat olehnya. Timbalan Pendakwa Raya pun mengaku bahawa perayu tidak perlu mengemukakan keterangan untuk menyokong pembelaanya. Walau bagaimanapun, perayu telah mengaku mempunyai milikan beg tersebut, yang konsisten dengan fakta kes ini dan yang diakui oleh peguamnya. Memandang bahawa anggapan pengetahuan di bawah s. 37(d) Akta telah diaktifkan, anggapan

A mengedar di bawah s. 37(da) Akta tidak boleh digunakan. Oleh itu, sabitan di bawah s. 39B(1)(a) Akta digantikan dengan sabitan di bawah s. 6 dibaca bersama dengan s. 39A Akta, memandangkan amaun dadah (70.2 gram monoacetylmorphine) yang terlibat.

B *[Hukuman 15 tahun dalam penjara bermula dari tarikh penangkapan dan hukuman mandatori sepuluh sebatan rotan.]*

Case(s) referred to:

C *Muhammed Hassan v. PP [1998] 2 CLJ 170 FC* ***(refd)***
Tan Foo Su v. PP [1967] 1 LNS 179 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***

Legislation referred to:

D Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A, 39B(1)(a)

For the appellant - Hisham; M/s Teh Poh Teik & Co
For the respondent - Wong Chiang Kiat DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-15-1999]

E *Reported by Suresh Nathan*

JUDGMENT

F **Hashim Yusoff JCA:**

[1] This is an appeal by Cheah Yoon Lim who was found guilty, convicted and sentenced to death by the Johor Bahru High Court for an offence of drug trafficking under s. 39B(1)(a) of the G Dangerous Drugs Act 1952 ("the Act"). We heard the appeal on 1 March 2005 and substituted the finding of guilt and conviction under s. 39B(1)(a) to one under s. 6, read together with s. 39A of the Act. We now give our reasons for doing so.

H **Brief Facts**

[2] On 30 October 1998, acting on information received, Inspector Charun a/l Aai Been (PW3) and a police party proceeded to the car parking area of Block C Flats, Taman Tampoi Indah, in the District of Johor Bahru, Johor. On arrival at I about 8.15pm the police party waited in ambush for the person

suspected to be trafficking in drugs. At about 10pm, PW3 saw a male Chinese (later identified as "the accused") coming down from the staircase of Block C Flats holding a black bag (P5A) proceeding towards a car, registration number JEU 5912 which was parked in the ground parking area. He then saw the accused press the remote control button of car JEU 5912. At that material time PW3 was about 8 meters away from the accused while the other members of the police party were about 5 meters away from him.

[3] PW3 followed the accused and at the same time gave the signal for his ambush party to move in. When they were near the accused, PW3 identified himself as a police officer and showed his authority card to the accused. The accused was stunned and tried to escape. But he was apprehended by the police party.

[4] PW3 then asked the accused to remove the black bag which was saddled across his neck, and to open it. The accused did as ordered. Upon the bag being opened by the accused, PW3 took out its contents in front of the accused and the police party. These contents were later confirmed by the chemist (SP2) to contain 70.2 grams of monoacetylmorphines. Based on the prosecution evidence, the trial court called for the defence.

[5] In his defence the accused said that the said bag (P5A) was left behind in his restaurant by one "Ah Koon" after he had received a phone call and left the restaurant. Apparently Ah Koon had forgotten to take the bag with him when he left the accused's restaurant. The accused said Ah Koon had called him and requested him to send the bag to him at Perling Mall, the same night. Since Ah Koon didn't turn up, the accused then took the bag with him to his flat. He testified that he had left the bag in the car and was not carrying it with him when he was arrested by the police.

Submission Of Counsel For The Appellant

[6] Before us, counsel for the appellant raised two main points of appeal:

A (i) the learned trial judge failed to appreciate the defence case thereby imposing an unusually higher burden on the appellant to raise a reasonable doubt;

(ii) the conflicting versions between the prosecution and the
B defence case ie, the prosecution says the appellant was carrying the bag containing the drug whilst the appellant says the bag was not with him but was already in the back seat of the car and that it belonged to one "Ah Koon".

C **[7]** In his cautioned statement the appellant (exh. D14) mentioned that Ah Koon came into his restaurant carrying one black bag. Then while having his meal at the appellant's restaurant, he received a phone call and quickly left the restaurant, leaving his bag on a chair at the table where he was having his
D meal. It was only later that Ah Koon had called his hand phone asking whether the appellant had seen his black bag and if so, to keep it safely. After that Ah Koon had called him again and asked him if he could bring the said bag to Perling Mall.

[8] The appellant testified that when he was coming down from
E the flat and walking towards the car, he was carrying his hand phone and the car key. Before he reached his car someone came from behind and arrested him. He said he was pushed down and fell to the ground. Before being pushed down, he never attempted to run. As far as the bag (P5A) was concerned, it was found on
F the back seat of the car. It was Inspector Charun (PW3) who took the bag out of the car.

DPP's Submission

G **[9]** The learned DPP however submitted that the cautioned statement of the appellant never mentioned that the said bag was left in the back seat of the car. In fact, what the appellant said was that before he could proceed to enter the car at 10pm that night, the police arrived and arrested him. Reference was made to
H the case of *Teh Geok Hock v. Public Prosecutor* [1989] 3 MLJ 162 where the Supreme Court *inter alia*, Held (1):

> The definition of "trafficking" in the Dangerous Drugs Act is wide and includes not only buying and selling but also carrying, concealing and keeping.

I

[10] It was further submitted that possession had been proven and therefore the presumption of knowledge under s. 37(d) of the Act applies to prove that the appellant knew of the contents of the bag to be drugs.

Court's Finding

[11] We have perused the grounds of judgment of the learned trial judge. At p. 73 of the appeal record, the learned trial judge stated, "Assuming the accused's version is true, why was there no evidence led as regards the existence of the mysterious Ah Koon? If, according to accused, it is true that Ah Koon had frequented the restaurant, they surely, accused's workers or one of them at least, could have testified to this fact and confirmed Ah Koon was there at the restaurant that night. If accused's version is correct and that he was at the cashier, then one of the workers could have been the one who alerted him about the bag being left behind by Ah Koon. Why was anyone not called to testify about this?"

[12] We agree with the learned counsel for the appellant that the learned trial judge had placed an extra burden on the defence and therefore it amounts to a serious misdirection on her part. (Refer to the case of *Tan Foo Su v. Public Prosecutor* [1967] 1 LNS 179). Even the learned DPP conceded that the accused need not call evidence to corroborate his story.

[13] However there is an admission of possession of the bag by the appellant. This is consistent with the facts and this was also conceded by his counsel. In view of the activation of the presumption of knowledge under s. 37(d) of the Act, the presumption of trafficking under s. 37(da) of the Act cannot be invoked (see *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170). Without the aid of the presumption the facts are insufficient to support a case for trafficking. We therefore substituted the finding of guilt and conviction under s. 39B(1)(a) of the Act to one under s. 6 to be read together with s. 39A of the Act in view of the amount of the drugs involved and set aside the sentence imposed.

[14] Accordingly we imposed a sentence of 15 years imprisonment to commence from his date of arrest and the mandatory ten strokes of whipping.

[15] My learned brothers, YAA Tan Sri Richard Malanjum and YA Dato' Sri Augustine Paul JJCA have read this judgment in draft and have expressed their agreement with it.